DOCUMENT RESUME

ED 270 346 SO 017 140

AUTHOR Levin, Betsy
TITLE The U.S. Constitution and Education.
PUB DATE Apr 86
NOTE 52p.; Presented at the Annual Meeting of the American Educational Research Association (70th, San Francisco, CA, April 16-20, 1986).
PUB TYPE Reports - Research/Technical (143) -- Viewpoints (120) -- Speeches/Conference Papers (150)

EDRS PRICE MF01/PC03 Plus Postage.
DESCRIPTORS Academic Freedom; *Civil Rights Legislation; *Discriminatory Legislation; *Educational Legislation; Federal Legislation; *Intellectual Freedom; Religion; *State Church Separation; Student Rights; Teacher Rights
IDENTIFIERS *United States Constitution

ABSTRACT

Although education is primarily a state function, its importance to our society makes it fertile ground for litigation. The Constitution--by authorizing the Congress to enact legislation--constrains and prescribes what happens in schools. Legislative histories, especially since the early 1960s, are outlined here. The major topics include: constitutional limits on the inculcation of religious, political, and moral values; freedom of expression for teachers and students in the school environment; the free exercise of religion; the requirements of fair procedures in the school environment; and the obligation to provide equal educational opportunity. (BZ)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED270346

U.S. DEPARTMENT OF EDUCATION
NATIONAL INSTITUTE OF EDUCATION
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

X This document has been reproduced as received from the person or organization originating it.
Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official NIE position or policy.

THE U.S. CONSTITUTION AND EDUCATION

by

Betsy Levin

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY

Betsy Levin

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

Prepared for the
American Educational Research Association's
Annual Meeting

April 1986

SP017140

This paper, or any part thereof, may not be used or reproduced without the author's permission.

September 1985

THE U.S. CONSTITUTION AND EDUCATION

by

Betsy Levin

I. INTRODUCTION

Education is primarily a state function; there is no direct federal constitutional responsibility for education. Nevertheless, Congress has enacted laws providing federal grants-in-aid of various kinds to state and local educational agencies, as well as laws protecting the civil rights of various categories of students. The constitutional authority for these statutes and their implementing regulations comes from Article I, Section 8, Clause 1 of the Constitution -- the Taxing and Spending Clause -- which has been interpreted as permitting conditions to be attached to the receipt of federal funds. Constitutional authority for the many civil rights mandates enacted by Congress may abso lie in Section 5 of the Fourth Amendment which provides that COngress may "enforce, by appropriate legislation, the provisions" of the Fourteenth Amendment.

In the absence of federal legislation, however, are there are constraints on the extent to which school authorities can control education and regulate the lives of students and teachers? And, conversely, do students and teachers have the same constitutional rights as all citizens in our society, or are these rights limited within the school environment?

Education plays a very important role in our democracy,[1]

which includes the transmission of society's common values and beliefs to the next generation.[2] These values include those democratic and constitutional values essential to good citizenship. The difficulty is how to inculcate those values without stifling the exercise of individual rights such as freedom of expression, freedom of religion, and other related values.[3] Does the special environment of the school -- taking into consideration the age of those involved and the very nature of the process of inculcating values -- necessitate that the rights of both teachers and students, otherwise available to citizens in our society at large, be somewhat circumscribed? On the other hand, if these rights are circumscribed to too great an extent, how are students then to become good citizens? How do we teach democratic norms in an institution that suppresses democratic values? The cases reflect these tensions, but the courts have not articulated clear guidelines for reconciling the conflict.[4]

Moreover, who decides which values are to be inculcated? Until about 30 years ago, these policy choices were the prerogative of educators. There were few legal constraints on school authorities and even fewer legal entitlements for teachers and students. Today various competing groups and individuals are seeking to control public education decision-making -- school boards, school administrators, teachers, parents, students, community leaders, minority groups, and federal and state agencies. Their struggles for control have often ended up in the courts.

Thus, decisions once made by school administrators and local boards of education have increasingly become the province of the courts. During the last 30 years, beginning with Brown v. Board of Education,[5] the United States Supreme Court has decided cases involving constitutional claims touching on nearly every major area of educational policy.[6] The involvement in educational policy areas on the part of lower federal courts and of state courts, beginning in the late sixties, has been even more pervasive.[7]

The initial question, whether states may constitutionally compel all children to be educated in state-run schools, was resolved by the Supreme Court in Pierce v. Society of Sisters[8], which held that while the State may compel all children to attend school, parents have a constitutional right to choose between public and private schools.[9] The balance struck between the interests of the State and the parents thus appears to be as follows: the State may inculcate its values in the public schools, but parents are free to choose for their children private schools which teach somewhat different values -- although the State may regulate those schools to some extent.[10] However, while the State must permit private education in the interest of allowing parents a choice, it need not fund it.[11]

Nearly 50 years after Pierce, the Supreme Court confronted the question whether there are constitutional interests of parents and children that outweigh the State's interests in com-

pelling all youngsters to attend some school (whether public or private).[12] The Court, in Wisconsin v. Yoder, emphasized that parental direction of the religious upbringing of their children is an important interest to be protected. The Court also noted, however, the importance of education to our democratic society. Since, in this case, the parents had satisfied the State's obligation through the 8th grade, the Court found that the interest of the State in compelling two more years of education was outweighed by the burden on the religious freedom of the Amish parents. Only the dissent discussed the possibility of the child's interest being different from that of the parent.[13] Indeed, the case seems really to be about who has the right to inculcate which values -- parent or State -- and not one about individual rights.

Thus, students may be required to be in some school for the purpose of learning, and if parents elect to send their children to public schools, the State has a much greater role to play in selecting the curriculum and regulating what is taught than it does in private schools. Education necessarily involves the process of selection; it also requires some degree of order to carry out the educational mission. On the other hand, as noted above, if the educational institution is wholly undemocratic in nature, the students are likely to get mixed signals with regard to the democratic values that they need to function as citizens in a democratic society. Thus, the courts have indicated that stu-

dents (and teachers) do not "shed their constitutional rights . . . at the schoolhouse gate."[14] Nevertheless, these rights are often circumscribed because of the "special characteristics of the school environment."[15]

To what extent may the government regulate the lives of public school children and their teachers? What are the bounds of permissible government socialization of students? What "academic freedoms" does the school teacher bring to the classroom? When are officials constitutionally required to permit students and teachers to express contrary viewpoints? With regard to fair procedures, are students and teachers constitutionally protected against arbitrary official actions? To what extent do equity-based claims constitutionally constrain or impose obligations on school officials? The constitutional claims made on the courts with regard to schooling have been directed principally toward the protection of individual freedom and the attainment of equality. In the first instance, the countervailing factor is concern for the stability and order of the educational enterprise; in the second instance, it is the differing conceptions of equality and the extent to which the educational enterprise is constitutionally obligated to respond to the equity-based claims of various groups absent a showing of intentional discrimination.

The remainder of this essay will attempt to show, on the one hand, the extent to which the educational enterprise is constrained by various constitutional rights and, on the other

hand, the extent to which these constitutional rights are circumscribed by the special characteristics of the school environment.

II. CONSTITUTIONAL LIMITS ON THE INCULCATION OF RELIGIOUS AND POLITICAL VALUES

A. Religious Values

The principal cases resolving the question of the proper place of religion in the curriculum of the public schools -- that is, the extent to which school authorities can socialize their students to religious values -- were decided in the early 1960s. In Engel v. Vitale, the Court struck down a non-denominational prayer written by the New York Board of Regents for use in the public schools.[16] A year later, the Supreme Court reviewed the practice of reading verses from the Bible and the recitation of the Lord's Prayer in public schools.[17] The Court pointed out that the State must be neutral with regard to religion, which means that a State may not require a religious service even with the consent of the majority of those affected.[18] Justice Clark was careful, however, to distinguish between the study of religion or of the Bible "when presented objectively as part of a secular program of education", and religious exercises.[19] Not until 1980 did the Supreme Court deal with another school prayer case. In Stone v. Graham, the Court held unconstitutional as violative of the Establishment Clause, a Kentucky law that required the posting of the Ten Commandments on the walls of public school

classrooms,[20] since the law "has no secular legislative purpose."[21] The Court again indicated, however, that the case would be different if the Ten Commandments were integrated into the school's curriculum, where the Bible could be studied as history, ethics, or comparative religion.[22]

B. Political and Moral Values

While the extent to which religious socialization can be undertaken in schools has been sharply limited,[23] less clear has been the extent to which the Constitution limits political and moral socialization. West Virginia v. Barnette acknowledges the right of school authorities to attempt to foster patriotism in the schools, but limits the means by which they can do so, holding that the Constitution protects the right of our non-participation in a patriotic ritual that, in effect, coerces an expression of belief.[24] So too, the First Amendment appears to prevent the editing out of particular ideas with a view to "prescrib[ing] what shall be orthodox in politics, nationalism, religion, or other matters of opinion,"[25] but otherwise the removal of certain books and curricular materials from the school library may be permitted.[26] The plurality opinion found that the First Amendment protected the "students' right to receive information,"[27] at least in the context of a school library. Does a student's right to know include the right of access to books or curricula that reflect racial, religious, or gender bias? The

tension between the First Amendment's prohibition of censorship and the desire to transmit other constitutional values such as non-discrimination thus becomes clear. Dicta in the plurality opinion in Pico, however, suggest that school officials may, with regard to the classroom at least, remove books for any reason.[28]

The reverse side of the coin is the extent to which parents have a constitutional right to exempt their children from being socialized to values held by the majority. Absent a clear Establishment Clause claim, it is unlikely that parents can demand that certain books or courses be excluded from the public school curriculum approved by school authorities.[29] And absent a clear Free Exercise claim -- that is, that a fundamental tenet of their religion is being unduly burdened[30] -- it is also unlikely that parents can exempt their children from certain courses to which they may object on moral or other grounds,[31] particularly since Pierce protects the option of sending their children to private schools if they disagree with the values being taught in the public school.[32] If the Constitution protects the right of parents to bring up their children as they wish,[33] that right may be given short shrift in the public schools as long as the Constitution requires the State to permit parents to send their children to private schools with somewhat different messages.[34]

III. FREEDOM OF EXPRESSION FOR TEACHERS AND STUDENTS IN THE SCHOOL ENVIRONMENT

Complete freedom of expression on the part of students -- or of teachers -- is inconsistent with the schooling enterprise, which requires order and control. Thus, while there are constitutionally protected rights of speech, these rights are limited where their exercise would disrupt the educational enterprise.

Speech or symbolic speech. Tinker v. Des Moines Independent Community School District, the leading case on the First Amendment rights of public school students, involved several high school students who had violated the school's regulation prohibiting the wearing of black armbands (as a symbol to protest the Vietnam War) while on school premises.[35] The school authorities had argued that the wearing of armbands was banned because those with opposing viewpoints might become upset, resulting in a disruptive atmosphere. The Court stated, however, that an "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[36] In order for school officials to be able to limit such expression, they must show "that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.'"[37] The Tinker standard thus clearly provides less protection for free expression in the special environment of the schools than is

available to the ordinary citizen.[38] The Court did not articulate any clear standards for determining what showing is required in order to find "material and substantial interference." Thus, lower courts have developed varying standards as they have applied the Tinker principles to cases involving newspapers, leaflets, buttons, and after-school political clubs or organizations.[39]

Student Newspapers. The law with regard to the dissemination of student newspapers, including "underground" newspapers, is that school authorities can control and regulate the time, place, and manner of dissemination as long as the regulations are not used to stifle the student's First Amendment rights. School authorities have frequently required that before any literature is disseminated, it must be submitted for approval. Most courts take a restrictive view toward such prior restraint requirements, requiring them to be accompanied by adequate procedural safeguards,[40] although the standard is less restrictive than that applied in society at large.[41] And the courts have taken as restrictive a view of sanctions imposed after publication as they have of prior restraints. The Supreme Court found the actions of the state university in expelling a college student for distributing an underground newspaper, found by the college to be "indecent", to be unconstitutional. "The mere dissemination of ideas -- no matter how offensive to good taste -- on a state university campus may not be shut off in the name alone of 'conven-

tions of decency.'"[42]

In summary, there has been an increase in judicial protection of the First Amendment rights of students to express themselves through student newspapers, whether underground or school-sponsored, or through symbols such as armbands and buttons. As long as the material being disseminated does not substantially disrupt or materially interfere with school activities or is not obscene, the power of school authorities to control the content of what is being disseminated is slight. Some lower courts, however, have required relatively little of school authorities for a showing of substantial disruption, thus significantly reducing the extent to which First Amendment rights are protected in the school environment.

Student organizations. The extent to which the First Amendment protects the right of individuals to associate to further their beliefs in the environment of a school or university was dealt with by the Supreme Court in Healy v. James.[43] The Court noted that the "special characteristics of the school environment" permitted government to prohibit "lawless action" that went beyond those actions that were crimes.[44] The Tinker standard applies, meaning that "associational activities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education."[45] Nevertheless,

since the effect of the denial of recognition of the student organization is a form of prior restraint, school authorities have a heavy burden of proving the likelihood of disruption.

Although the college in the Healy case refused to recognize a "local chapter" of Students for a Democratic Society (SDS), denying it the use of campus facilities, various other student organizations were permitted access. Thus, Healy might be seen as concerned with equal treatment -- that is, if a college permits student organizations access to its facilities, it cannot exclude one based on the political or social views the organization espouses. But can a high school or college deny all student organizations access to its facilities or is there a constitutional obligation to provide a forum?[46] And does the answer depend on whether it is a college or a high school?[47]

Personal appearance. Other issues of constitutionally protected student expression have arisen in the context of law suits challenging hair and dress code regulations. Does a student have a constitutional right to govern his own appearance? (And if so, is it the First Amendment's freedom of symbolic expression, the right of privacy found in the penumbras of the First, Fourth, Fifth and Fourteenth Amendments, or even the Equal Protection and Due Process Clauses that are being asserted?) The issue of whether a male student attending a public school has a constitutionally protected right to wear his hair in any manner that he

pleases has thoroughly divided the federal circuit courts,[48] and the Supreme Court contributed to the stalemate by its repeated refusals to review such cases.[49]

Teacher rights of expression. To what extent does a teacher, within the special demands of the school environment, have certain rights of expression? These questions have come up in a variety of contexts. One is the extent to which the right of the teacher as citizen to express himself or herself is circumscribed by being an employee of the school system. The other area concerns the teacher as a professional and his or her right to determine course content, selection of books, and the ideas and values to be presented. Is there an independent right of academic freedom,[50] or is it a corollary of the "students' right to know"?[51] These issues have not been clearly resolved by the Supreme Court.

With regard to the question of academic freedom in the classroom, the Supreme Court has never decided a case that squarely dealt with this issue. Keyishian notes that academic freedom is "a special concern of the First Amendment" and that protecting the free exchange of ideas within our schools is fundamentally important in promoting an open society.[52] Keyishian also noted that "the classroom is peculiarly the 'marketplace of ideas'" in our society.[53] However, Keyishian did not deal with the classroom and the teacher's right to choose the curriculum or

to teach the curriculum in any particular way, nor did Keyishian deal with public elementary and secondary school teachers.[54]

Epperson comments on "arbitrary" restrictions upon the freedom of teachers to teach and students to learn, but resolved the case on the basis of the Establishment Clause. The State's "undoubted right to prescribe curriculum for its public schools does not carry with it the right to prohibit, on pain of criminal penalty, teaching of a scientific theory or doctrine where that prohibition is based upon reasons that violate the First Amendment."[55] Justice Black, in his concurring opinion, sharply narrowed the idea that some notion of "academic freedom" is protected by the First Amendment.

> "I am . . . not ready to hold that a person hired to teach school children takes with him into the classroom a constitutional right to teach sociological, economic, political, or religious subjects that the school's managers do not want discussed. . . . I question whether . . . 'academic freedom' permits a teacher to breach his contractual agreement to teach only the subjects designated by the school authorities that hired him."[56]

On the other hand, while Justice Stewart would allow the state to determine whether a particular subject should or should not be included in a public school curriculum, the state should not be constitutionally permitted to punish a teacher for mentioning that there are other approaches to a particular subject.[57] Finally, if there is some aspect of "academic freedom" that has independent constitutional protection,[58] it may be at the college

or university level and not in public schools.

While lower court cases vary significantly as to whether "academic freedom" in a classroom with regard to subject and content selection is constitutionally protected,[59] dicta in Justice Brennan's plurality opinion in Pico suggest that school authorities have unfettered discretion to inculcate community values in students through the curriculum.[60] Thus, if this view prevails, the teacher would appear to have no unilateral right to dictate the lessons (especially value lessons) to which the student will be exposed. If the classroom is the vehicle for imparting values, perhaps it cannot also be an open "marketplace of ideas".

Other issues that have often been grouped under the rubric "academic freedom" really are concerned more with the freedom of expression of teachers as citizens outside the classroom and the extent to which such expression must be balanced against the interest of the State as employer. For example, in Pickering, a teacher had written a letter to the local newspaper critical of the school board. The Pickering holding is that "absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."[61] However, if the teacher's statements have been shown to have impeded his or her performance in the classroom or otherwise interfered with the regular operation of the schools, as might

be the case if he or she had "the kind of close working relationships . . . which . . . [require] personal loyalty and confidence", the speech might not be protected. In Mt. Healthy, a teacher claimed that his dismissal was in retaliation for activities protected by the First Amendment. The school board, however, insisted that his dismissal was due to his incompetence. The Court held that the teacher has the burden of establishing that his conduct was constitutionally protected, and that his conduct was a motivating factor in the board's decision not to rehire or to dismiss him. However, even if the teacher meets this burden, the school board may still show, by a preponderance of the evidence, that it would have reached the same decision as to the teacher's reappointment even in absence of the impermissible factor.[62]

While the Pickering doctrine may protect a teacher's public criticism or criticism voiced privately to an administrator or to his or her fellow teachers,[63] it is not clear whether it would extend to teachers who voice their criticisms in the classroom or before a student audience.[64]

IV. FREE EXERCISE OF RELIGION

Wisconsin v. Yoder dealt with the issue of exemptions from compulsory schooling in the context of a claim of an undue burden on the free exercise of religion.[65] Following Wisconsin v. Yoder, lower court cases have involved the extent to which private, sec-

tarian schools can be regulated by the state[66] or the federal government[67] without impermissibly burdening the free exercise of religion. There have been no Supreme Court cases dealing with interference by public school officials with the free exercise of religion,[68] although the issue was raised in Abington School District v. Schempp[69] by Justice Stewart, in a dissenting opinion. He argued that "a doctrinaire reading of the Establishment Clause leads to irreconcilable conflict with the Free Exercise Clause," noting that there was a "substantial free exercise claim on the part of those who affirmatively desire that their children's school day open with the reading of passages from the Bible."[70] The majority, however, gave little weight to this argument in the face of the strong Establishment Clause claim.

A type of Free Exercise claim has been made by some who have argued that public support of private education is a constitutional entitlement, meaning that the government, to be truly neutral, must subsidize religious education. This reading of the Free Exercise Clause says not only that the State cannot interfere with the exercise of one's religion, including the choice of a religious school, but that there is an affirmative requirement to provide sufficient resources to enable parents to choose a religious education for their children.[71] The question of constitutionally compelled subsidization of non-public education has rarely been adjudicated by the courts, but in those few cases, the courts have responded negatively.[72] In P.E.R.L. v. Nyquist,

the state had argued that the purpose of the tuition reimbursements and tax credits was to promote the free exercise of religion on the part of low-income parents who otherwise might not be able to afford a religious education for their children.[73] The majority dismissed this argument, noting that it might often be impossible to promote the free exercise of religion without violating the Establishment Clause. "In its attempt to enhance the opportunities of the poor to choose between public and non-public education, the state has taken a step which can only be regarded as one of advancing religion."[74] The Court has failed to suggest the basis for resolving the tension between the two clauses. It may be that the two clauses can never be reconciled -- that is, the effect of "neutrality" under one clause may necessarily be to violate the other clause.

V. THE REQUIREMENTS OF FAIR PROCEDURES IN THE SCHOOL ENVIRONMENT

Institutional rules and regulations may be as important to the socialization of students as the formal educational process. Much litigation has revolved around the extent to which the Constitution constrains school authorities in the manner in which these rules are applied to students and teachers. Are there certain requirements of fair procedures, even in the special environment of the school and regardless of the age of the student, that must be provided before a student's person or property

can be searched for evidence of the commission of a crime or a violation of a school rule, or before disciplinary action can be taken for failure to comply with institutional rules and norms?

A. Fourth Amendment Requirements

T.L.O. raises questions of what procedural protections are available to students in obtaining evidence to prove an infraction of a school rule or of a crime.[75] When may the special environment of the school permit a lesser standard to be applied to students that would not be constitutionally permitted if applied to citizens in society at large? What actions, if any, may school officials undertake that would be barred by the Constitution if the actions were those of the police? What are the implications of differing standards for the socialization of students with regard to constitutional rights, with regard to the obligation to respect other people's rights, and with regard to attitudes toward invasions of privacy?

Generally, a search made of private property is "unreasonable" under the Fourth Amendment if made without a valid search warrant.[76] Even when the circumstances are such that courts have permitted warrantless searches, however (e.g., where necessary to prevent concealment or destruction of evidence),[77] such searches usually require a showing of a "probable cause" belief that the law has been violated.[78] In New Jersey v. T.L.O, however, the Court, in balancing school authorities'

"substantial" interest in maintaining discipline in the classroom and on school grounds against students' legitimate expectations of privacy,[79] fashioned a less protective standard for searching students. The search must be "justified at its inception" and the scope of the search "reasonably related" to the circumstances which originally justified the search.[80] A search by school authorities is "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated either the law or rules of the school. The search is of permissible scope when "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[81] Moreover, there is no warrant requirement for in-school searches.[82]

B. Due Process Requirements

Important constitutional values are incorporated in our notions of fairness that underlie the due process clause. To what extent does the nature of the school environment and its special demands affect the traditional requirements of due process that apply to citizens in our society?

Goss v. Lopez, in a five-to-four opinion, holds that there can be state-created entitlements to a public education that are protected by the due process clause. In other words, the right to an education may not be withdrawn on the grounds of misconduct,

absent some procedures for determining whether the misconduct has occurred.[83] Goss also holds that arbitrary deprivations of liberty are prohibited.[84] However, having decided that some process is due, it appears that the requirements of due process can be quite minimal in the school environment. In the case of a ten-day suspension of a student for disciplinary reasons, Goss requires only that the student be given notice of the charges against him, an explanation of the evidence against him, and an opportunity to explain his version of the story. Immediate removal from school may be justified in some cases even before the hearing. The hearing itself may simply be a brief meeting between the student and the disciplinarian minutes after the alleged transgression.[85] More stringent safeguards, however, may be required for deprivations of education that might be significantly longer than the ten-day period involved in Goss.[86]

Just two years after Goss, also in a five-to-four opinion, the Court held that although the administration of corporal punishment for allegedly violating school rules implicated a constitutionally protected liberty interest, "the traditional common law remedies were fully adequate to afford due process." [87] Thus, no advance procedural safeguards were constitutionally required.[88]

Since academic grades and evaluations were said by the Supreme Court to involve more subjective and evaluative judgments than the typical factual questions presented in the average disclipi-

nary decision, such evaluations were not readily adapted to procedural tools.[89] Thus, the determination of how much process is required turns on whether the classification is one for "academic" or for disciplinary reasons. The Court, however, did not necessarily say that no process is due when the dispute is "academic" in nature.[90]

The Supreme Court has held that a teacher has a right to procedural due process before being terminated, depending on whether the teacher can show a liberty or property interest at stake which warrants Fourteenth Amendment protection. In 1972 the Court articulated standards for finding such interests in Board of Regents v. Roth[91] and Perry v. Sinderman.[92]

VI. THE OBLIGATION TO PROVIDE EQUAL EDUCATIONAL OPPORTUNITY

A. Problems of Definition

What is the nature of the entitlements to equal educational opportunity that are embodied in the federal Constitution? These entitlements function as additional constraints on the ways in which public schools operate. Demands upon public schools can be affirmative, asserting an entitlement to a minimum educational opportunity, to equal access to the schooling process, or to a specified educational outcome. Or they may be framed negatively, asserting a right to be free of discrimination on the basis of race, sex, handicap, or class in the operation of the public schools.

Race. The most fully matured and litigated definition of equal educational opportunity is the right of minority students to be free of racial discrimination. The principal issues have concerned (1) the requirements for finding that the constitution has been violated, and (2) the scope of the remedy once a constitutional violation has been established. Under the first category, the following questions have been raised: Can intentional actions of school authorities constitute de jure segregation?[93] Are actions not motivated by intent to segregate, but that result in segregated patterns of schooling, unconstitutional? Can intent be inferred from actions that have the foreseeable effect of fostering segregation?[94] What is a "continuing" violation?[95] Does the lapse of time between past segregative acts and present segregation eliminate the presumption of causation and hence intent?[96] The second category has included such questions as: Are quotas or affirmative action to assist minorities who have been handicapped by past discrimination unconstitutional?[97] What are permissible remedial techniques and are there limits to their use by the judiciary?[98] When is a system-wide remedy permissible, and what proof is required before a system-wide remedy can be ordered?[99] Can school district boundaries be reorganized in order to devise an effective remedy?[100]

Gender. As with minority students, equal educational opportunity with regard to gender is an assertion of the right to be

free of discrimination on the basis of gender. However, most of the case law has developed under Title IX of the 1972 Education Amendments and its implementing regulations.[101] Thus, there has been limited constitutional development in this area. Early cases, prior to the passage of the Act and its subsequent regulations, were primarily litigated in the lower courts. Many of those cases indicated that a "separate but equal" program would be permissible because it did not connote "a stigmitizing inferiority", as did race.[102] Thus courts often treated differently the complete denial of access to a particular curriculum, course, or athletic activity than "separate but equal" educational offerings.[103] "Separate but equal" in the case of gender differentiation may not be "inherently unequal".[104]

Resources. In addition to equal educational opportunity issues raised in the context of denial of access to programs or of "separate but equal" programs, equal educational opportunity has been defined in terms of resources -- dollars per pupil or the educational resources those dollars buy. The school finance reform movement of the 1970s concerned inequalities in educational opportunity (resources) among school districts.[105] The issue in those cases was when, as a constitutional matter, inequalities among districts in the amount of money spent per pupil were impermissible. A variety of standards for assessing whether a school financing system provided students with an equal educational opportunity were developed.[106]

Physically, mentally, and linguistically handicapped students. While handicapped students and limited English proficient students have, like minorities or women, sought to be free of discrimination -- i.e., to be treated equally with respect to educational offerings -- in some circumstances these groups have sought to impose an affirmative duty on the government to remove a barrier not necessarily of the government's making, such as limited English language ability. Under this interpretation of the equal educational opportunity that is protected by the Constitution, the government has a duty to treat people differently. For example, children who speak only Chinese may be constitutionally entitled to special educational programs even though they have the same access to teachers, books, etc. as other children, since they cannot understand what goes on in the regular classroom where only English is spoken. If they do not receive special treatment, the argument goes, they do not have an opportunity equal to that of others to take advantage of the education the government offers to all. The denial of equal protection of the laws then arises because the government fails to classify them and treat them differently than all other school children.

The issue is further complicated by the question whether the constitutional violation occurs only when the failure of the government affirmatively to provide such children with extra resources or special treatment has amounted to the functional

equivalent of an absolute deprivation of education,[107] or whether the violation occurs merely when school authorities have failed to take action to overcome barriers of language or handicap that impede a child from learning equally with those without such barriers.[108] This approach to equal educational opportunity -- the focus on an affirmative duty to provide special, additional services for certain groups -- has not yet been held by the Supreme Court to be constitutionally dictated. The only cases to come before the Court were decided on statutory grounds without having to reach the constitutional question.[109] Thus this issue still remains unsettled.

B. Of Suspect Classes and Fundamental Interests

1. Suspect Class Argument. In order to trigger the "strict scrutiny" equal protection standard of judicial review of a state school financing scheme that resulted in inequalities in per pupil expenditures among school districts in Texas, the plaintiffs in San Antonio Independent School District v. Rodriguez[110] sought to persuade the Supreme Court that the state's school financing legislation discriminated on the basis of wealth, which they argued was a "suspect" classification like race. The Court, however, held that Texas' system of financing schools did not discriminate against any class of persons considered suspect.[111] A class is suspect if it is "saddled with such disabilities, or subjected to such a history of purposeful une-

qual treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[112]

2. Fundamental interest argument. The Rodriguez plaintiffs also argued that education was a fundamental right, attempting to tie education to rights already declared fundamental, such as free speech and voting. This argument met with no success, however. The Court saw the connection as no more compelling than the connection between housing, food, or other subsistence needs and the right to vote. It refused "to create substantive constitutional rights in the name of guaranteeing equal protection of the laws," stating that for a right to be fundamental it must be "explicitly or implicitly guaranteed by the Constitution."[113]

Since, according to the Rodriguez majority, the finance system neither discriminated against a suspect class nor touched on a fundamental interest, the financing scheme must be assessed in terms of the rational basis standard of review. The Court found that the existing system was rationally related to the purpose of promoting local school district control.[114]

The Supreme Court's opinion in Rodriguez distinguished relative differences among school districts in per pupil expenditures from a state "financing system that occasioned an absolute denial of educational opportunities to any of its children."[115] The Court noted that a tuition assessment plan that "absolutely precluded

[poor children] from receiving an education . . . would present a far more compelling set of circumstances for judicial assistance than the case before us today."[116] Those statements raise two related constitutional questions: (1) Under what circumstances, if any, is exclusion of a class of children from public schools constitutionally justifiable; and (2) if absolute deprivation of an education is unconstitutional, can this principle be extended to certain children who, although attending public schools, are "functionally excluded"? Doe v. Plyler raised the first question and Lau v. Nichols the second question.

3. Somewhat less than suspect classes and important, but not fundamental, interests.

Gender. In Craig v. Boren, the Court indicated that gender would not be treated as a suspect class, as is race, but as a category requiring intermediate level scrutiny. Thus, a gender classification must serve important governmental objectives and must be substantially related to the achievement of those objectives before it can be upheld.[117] It is unclear whether, if the Vorchheimer case, involving gender segregated elite public high schools,[118] were before the Supreme Court today, separate but equal schools in the case of gender would be upheld under the Craig v. Boren standard. Mississippi University for Women v. Hogan does not resolve that issue.[119] That case involved the exclusion of males from MUW's School of Nursing. Justice O'Connor, writing

for the majority, held that the State failed to meet its burden under the Craig v. Boren standard. The State had argued that its single-sex admissions policy was designed to compensate for discrimination against women. The State was unable, however, to show that women were discriminated against in the field of nursing. Indeed, Justice O'Connor found that the policy of excluding males from the School of Nursing "tends to perpetuate the stereotyped view of nursing as an exclusively women's job."[120] The State also failed to show that the gender-based classification was substantially related to its purported compensatory objective since MUW permitted males to audit nursing courses. The opinion does not indicate whether the same result would have been reached if men were excluded from an engineering curriculum or if there were either an all male or a coed nursing school nearby.

Illegal aliens. In Doe v. Plyler, the Court was faced with total deprivation of the education of illegal alien children.[121] The Court indicated that education was an important, although not a fundamental, interest and that the classification of illegal alien children was of an intermediate, not suspect, status. Thus a state statute which permitted school districts to bar illegal alien children from public schooling was held unconstitutional. Whether placing these children in separate schools, or giving them fewer educational resources, although not denying them

access to all education, would withstand intermediate level scrutiny is not clear.

Handicapped. The only cases involving handicapped students to reach the Supreme Court involved the interpretation of federal statutes and regulations.[122] The Court has not resolved a constitutional case involving either total or functional exclusion of the handicapped from education or inappropriate education for such students. It is clear, after Cleburne,[123] that the handicapped are not to be treated as a suspect class. Indeed, Cleburne indicates that the handicapped are entitled only to the application of the rational relationship standard on equal protection claims.[124] However, now that Doe v. Plyler has held that education is an important interest, would the handicapped receive some special protection under the Constitution with regard to education? Or if the handicapped are not even to be considered intermediate status, do they receive even less protection than illegal aliens? On the other hand, Doe v. Plyler involved the total exclusion of illegal alien children from public schooling and we have seen that even in Rodriguez the total deprivation of education might be constitutionally impermissible. Thus, arguably, the total exclusion -- or perhaps even the functional exclusion -- of handicapped children from education would be deemed unconstitutional, but the failure to provide an appropriate or equal education (if "equal" were interpreted as

special treatment and additional resources to bring the handicapped child to the same starting line as other children) would not be constitutionally impermissible.

Limited English proficient children. The "functional exclusion" of language minority children has been struck down by the Supreme Court on statutory grounds and not on constitutional grounds.[125] The question has been raised whether there is an affirmative duty on the part of school officials to provide special educational programs for limited English proficient children in the absence of any prior discrimination by the State. The Supreme Court has not dealt with this on constitutional grounds and lower court decisions suggest that if the question were presented to the Supreme Court, it would be unlikely that the Court would find such a duty on the part of school officials absent intentional and deliberate discrimination.[126]

VII. CONCLUSION

Unlike a citizen in our society, whose First Amendment rights of free expression and of free exercise of religion can be circumscribed only when the State has shown a compelling justification, and its objective can be accomplished by no less restrictive means, the courts appear to balance First Amendment rights of students and teachers against the interest of the school authorities in inculcating community values and in main-

taining order and control so that the educational mission can be accomplished. The same appears to be true of Fourth Amendment protections and the procedural due process requirements of the Fourteenth Amendment. Moreover, in many instances, these constitutional rights appear to be given greater weight when the environment is that of a college or university than when it is a high school.[127] This appears to be attributable to two factors. One is that the university is a place for inquiry, the "marketplace of ideas", and less a place for inculcating community values or for socializing students than is the public high school. The other factor is the age of the students, who in a college or university are thought to be more mature and thus better able to evaluate ideas for themselves.

In addition to these individual rights, there are also questions of the extent to which the Constitution protects the right of various pupil populations not to be denied equal educational opportunity on the basis of impermissible classifications. Here there has been less of a balancing of interests because of the "special circumstances of the school environment." Rather, the constitutional requirements, developed in other areas of the law, seem to be applied: that an affirmative duty may not be imposed on school officials unless there is proof of intent to discriminate or the classification is a stigmatizing one, or there has been a total deprivation of education based on an impermissible classification.[128]

FOOTNOTES

*Dean and Professor of Law, University of Colorado; LL.B. Yale University. The author wishes to acknowledge the very able research assistance of Stephen A. Hess, a second-year law student at the University of Colorado School of Law.

1. See, e.g., Brown v. Board of Education, which notes "the importance of education to our democratic society" and also that education "is the very foundation of good citizenship." 347 U.S. 483, 493 (1954).

2. See, e.g., Ambach v. Norwick, in which the Court acknowledges the importance of the public schools "in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests." 441 U.S. 68, 76 (1979). See also Board of Educ., Island Trees Union Free Schl. Dist. v. Pico, noting that "there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political." 457 U.S. 853, 864 (1982) (plurality opinion) quoting Brief for Petitioners.

3. The fact that schools "are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individuals, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

4. The State may clearly use the "public schools [to] . . . inculcat[e] fundamental values necessary to the maintenance of a democratic political system." Ambach v. Norwick, 441 U.S. 68, 77 (1979). On the other hand, school officials may not "prescribe what shall be orthodox in politics, nationalism, religion, on other matters of opinion. . . ." West Virginia Board of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

5. 347 U.S. 483 (1954).

6. See, e.g., Epperson v. Arkansas, 393 U.S. 97 (1968) (school curriculum); Board of Education, Island Trees Union Free Sch. Dist. v. Pico, 457 U.S. 853 (1982) (removal of books from school libraries); Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969), Papish v. Board of Curators of the University of Missouri, 410 U.S. 667 (1973) (student rights of free expression and non-disruptive protest); Pickering v. Board of Education, 391 U.S. 563 (1968), Mt.

Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977) (teacher rights of free expression); Wisconsin v. Yoder, 406 U.S. 205 (1972) (exemptions from state compulsory school attendance laws); San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) (school finance reform); Brown v. Board of Education, 347 U.S. 483 (1954), Columbus Board of Education v. Penick, 443 U.S. 449 (1979), Washington v. Seattle School Dist. No. 1, 458 U.S. 457 (1982) (duty to desegregate); Milliken v. Bradley, 418 U.S. 717 (1974) (reorganization of school district boundaries to undo segregation); Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) (school personnel policies); Epperson v. Arkansas, supra, Kevishian v. Board of Regents, 385 U.S. 589 (1967) (academic freedom); Healy v. James, 408 U.S. 169 (1972), Widmar v. Vincent, 454 U.S. 263 (1981), Shelton v. Tucker, 364 U.S. 479 (1960) (student and teacher associational rights); Engel v. Vitale, 370 U.S. 421 (1962), Abington School District v. Schempp, 374 U.S. 203 (1963), Wallace v. Jaffree, ____ U.S. ____, 105 S. Ct. 2479 (1985) (prayer in public schools); Goss v. Lopez, 419 U.S. 565 (1975), Ingraham v. Wright, 430 U.S. 651 (1977), Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78 (1978) (student discipline); New Jersey v. T.L.O., ____ U.S. ____, 105 S. Ct. 733 (1985) (search of student for evidence of rules infraction); Mississippi University for Women v. Hogan, 458 U.S. 718 (1982), Vorchheimer v. School District of Pennsylvania, 430 U.S. 730 (1977), affirming by an equally divided Court, 532 F.2d 880 (3d Cir. 1976) (discrimination in admission to schools or programs on the basis of gender); Wood v. Strickland, 420 U.S. 308 (1975) (liability of school officials for violating the rights of students and teachers); Carey v. Piphus, 435 U.S. 247 (1978) (nature of damages, once liability found).

The Supreme Court has also dealt with issues involving discrimination in the education of the handicapped, Board of Education v. Rowley, 458 U.S. 176 (1982), Irving Indep. Sch. Dist. v. Tatro, ____ U.S. ____, 104 S. Ct. 3371 (1984), and of those with limited English proficiency, Lau v. Nichols, 414 U.S. 563 (1974), in resolving federal statutory claims.

Earlier in this century, the Supreme Court decided landmark cases involving issues of compulsory public schooling, Pierce v. Society of Sisters, 268 U.S. 510 (1925); state regulation of private schools; Meyer v. Nebraska, 262 U.S. 390 (1923), Farrington V. Tokushige, 273 U.S. 284 (1927); and coerced professions of belief in public schools, West Virginia v. Barnette, 319 U.S. 624 (1943).

See, generally, M. YUDOF, D. KIRP, T. van GEEL, and B. LEVIN, EDUCATIONAL POLICY AND THE LAW (2d ed. 1982).

7. See, e.g., Hobson v. Hansen, 327 F. Supp. 844 (D. D.C. 1971) (unequal resources for poor and minority school children); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972) (failure to provide appropriate education for the handicapped); Berkelman v. San Francisco Unified School Dist., 501 F.2d 1264 (9th Cir. 1974) (discrimination on the basis of gender in admission to schools); Hobson v. Hansen, 269 F. Supp. 401 (D. D.C. 1967), aff'd sub nom. Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) (en banc) (tracking and ability grouping); Peter W. v. San Francisco Unified School Dist., 60 Cal. App.3d 814, 131 Cal. Rptr. 854 (1976), Hoffman v. Board of Educ., 49 N.Y.2d 121, 400 N.E.2d 317, 424 N.Y.S.2d 376 (1979) ("educational malpractice"); United States v. North Carolina, 400 F. Supp. 343 (E.D.N.C. 1975) (teacher certification); Debra P. v. Turlington, 644 F.2d 397 (5th Cir. 1981) (minimum competency testing).

8. 268 U.S. 510 (1925).

9. Pierce also held that the schools, as corporations, have a "clear and immediate" property interest such that they are protected from "arbitrary, unreasonable and unlawful interference with their patrons." 268 U.S. at 536.

10. In holding in Pierce that while the state may make education compulsory, it may not compel all children to attend its own schools, the Court indicated that the State could "reasonably" regulate private schools.

> No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, to supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies claiming essential good citizenship must be taught, that nothing be taught which is manifestly inimical to the public welfare. 268 U.S. at 534.

Two other Supreme Court cases decided at about the same time as Pierce dealt with the extent to which government can regulate non-public education. See Farrington v. Tokushige, 273 U.S. 284 (1927); Meyer v. Nebraska, 262 U.S. 390 (1923). Other than these cases, the extent to which states may regulate private schools has been litigated only since the mid-1970s and primarily in state courts. Compare Ohio v. Whisner, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976) (striking down state regulations), with State ex rel. Douglas v. Faith Baptist Church, 207 Neb. 802, 301 N.W.2d 371, app. dismissed,

454 U.S. 803 (1981) (upholding regulations). Cf., Runyon v. McCrary, 427 U.S. 160 (1976).

11. Under the Establishment Clause, the state is not permitted to fund nonpublic sectarian schools. Any aid will violate the Establishment Clause which either has a "principal or primary effect" of advancing religion or whose administration will excessively entangle the government with the state. Lemon v. Kurtzman, 403 U.S. 602 (1971). A long line of cases since Lemon has articulated those standards and refined their application, culminating in Grand Rapids School District v. Ball, ____ U.S. ____, 105 S. Ct. 3216 (1985) (unconstitutional primary effect) and Aguilar v. Felton, ____ U.S. ____, 105 S. Ct. 3232 (1985) (unconstitutional entanglement).

12. Wisconsin v. Yoder, 406 U.S. 205 (1972).

13. Id. at 241 (Douglas, J., dissenting in part).

14. See Tinker v. Des. Moines Independent School Dist., 393 U.S. 503, 506 (1969).

15. Id.

16. 370 U.S. 421 (1962). In an often-quoted statement, Justice Black said that the Establishment Clause "must at least mean that [it] is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government." Id. at 425.

17. Abington School Dist. v. Schempp, 374 U.S. 203 (1963).

18. Id. at 225.

19. Id. at 225.

20. 449 U.S. 39 (1981) (per curiam).

21. Id. at 41.

22. Id. at 42. In the most recent school prayer case, Wallace v. Jaffree, ____ U.S. ____, 105 S. Ct. 2479 (1985), the Court struck down an Alabama statute authorizing a period of "meditation or voluntary prayer" as not reflecting a clear secular purpose, and thus violating the first Lemon test. It should be noted that most of the Establishment Clause cases arose in the context of public aid to parochial schools. See, e.g., Grand Rapids School District v. Ball, ____ U.S. ____, 105 S. Ct. 3216 (1985), Aguilar v. Felton, ____ U.S.

____, 105 S. Ct. 3232 (1985), Mueller v. Allen, 463 U.S. 388 (1983), Wolman v. Walter, 433 U.S. 229 (1977), Roemer v. Maryland Public Works Board, 426 U.S. 736 (1976), Meek v. Pittenger, 421 U.S. 349 (1975), Sloan v. Lemon, 413 U.S. 825 (1973), Committee for Public Education v. Nyquist, 413 U.S. 756 (1973), Hunt v. McNair, 413 U.S. 734 (1973), Levitt v. Committee for Public Education, 413 U.S. 472 (1973), Lemon v. Kurtzman, 403 U.S. 602 (1971).

23. See, e.g., Abington School District v. Schempp, 374 U.S. 203 (1963), Engel v. Vitale, 370 U.S. 421 (1962), Epperson v. Arkansas, 393 U.S. 97 (1968), Stone v. Graham, 449 U.S. 39 (1981) (per curiam), Wallace v. Jaffree, ____ U.S. ____, 105 S. Ct. 2479 (1985).

24. 319 U.S. 624 (1943).

25. Board of Educ., Island Trees Union Free School Dist. v. Pico, 457 U.S. 853, 872 (1982), quoting West Virginia Bd. of Educ. v. Barnette, 319 U.S. at 642.

26. School officials may remove books from the school library that are "pervasively vulgar" or educationally unsuitable. Pico, 457 U.S. at 871 (plurality opinion). Pico does not, however, impose a requirement on the part of school officials to add certain books to their school libraries. Id. at 871-72.

27. 457 U.S. at 868. The right to receive information and ideas is "an inherent corollary of the rights of free speech . . . explicitly guaranteed by the Constitution. . . ." Pico, 457 U.S. 853, 867 (plurality opinion), and students too have these First Amendment rights. Access to ideas "prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members." Id.

28. "Petitioners might well defend their claim of absolute discretion in matters of curriculum by reliance upon their duty to inculcate community values." Pico, 457 U.S. at 869 (plurality opinion) (emphasis in original).

29. See, e.g., Hopkins v. Hamden Board of Education, 29 Conn. Supp. 397, 289 A.2d 914 (1971).

30. See, e.g., Davis v. Page, 385 F. Supp. 395 (D. N.H. 1974)

31. See generally, Hirschoff, Parents and the Public School Curriculum: Is There a Right to Have One's Child Excused from Public Instruction?, 50 SO.CAL. L.REV. 871 (1977).

32. Note Justice Brennan's comments in the context of the First

Amendment's religion clauses:

> Attendance at the public schools has never been compulsory; parents remain morally and constitutionally free to choose the academic environment in which they wish their children to be educated. The relationship of the Establishment Clause of the First Amendment to the public school system is preeminently that of reserving such a choice to the individual parent, rather than vesting it in the majority of votes of each State or school district. The choice which is thus preserved is between a public secular education with its uniquely democratic values, and some form of private or sectarian education, which offers values of its own. In my judgment the First Amendment forbids the State to inhibit that freedom of choice by diminishing the attractiveness of either alternative -- either by restricting the liberty of the private schools to inculcate whatever values they wish, or by jeopardizing the freedom of the public schools from private or sectarian pressures.

Abington School Dist. v. Schempp, 374 U.S. 203, 242 (1963) (Brennan, J., concurring).

33. See, e.g., Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

34. The Pierce Court identified the interest at stake as "the liberty of parents . . . to direct the upbringing and education of children under their control," and noted "those who nurture [the child] and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." 268 U.S. at 534-35. A later Supreme Court case identified that right as "cardinal," but cautioned that "neither the rights of religion nor rights of parenthood are beyond limitation. . . . [t]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare." Prince v. Massachusetts, 321 U.S. 158 (1944) (upholding state law applied to prevent child from passing out religious literature on streets). The extent of the state's power in education was held to be quite broad in Baker v. Owen, 395 F. Supp. 294 (M.D.N.C.), aff'd mem. 423 U.S. 907 (1975), which held that the parent's right was not "fundamental". 395 F. Supp. at 299.

35. 393 U.S. 503 (1969).

36. Id. at 508.

37. Id.

38. The Tinker case suggests still another way in which the right of expression is limited within the school. Since "substantial or material disruption of the educational process" could result from the reaction of others to the speaker's message, the prohibition against permitting the heckler's veto to be the basis for suppressing speech, see, e.g., Terminiello v. Chicago, 337 U.S. 1 (1949), does not appear to apply within the school environment.

39. See, e.g., Pliscou v. Holtville Unified School District, 411 F. Supp. 842 (S.D. Cal. 1976) (students' right to publish and solicit advertising for unofficial school newspaper is protected); Hatter v. Los Angeles City High School District, 310 F. Supp. 1309 (C.D. Cal. 1970) (distribution of leaflets and wearing of tags urging boycott of school candy sale to protect dress code is not protected activity); Dixon v. Beresh, 361 F. Supp. 253 (E.D. Mich. 1973) (school must recognize eligible student groups absent showing of disruption or impairment of school operation); Guzick v. Drebus, 431 F.2d 594 (6th Cir.), cert. denied, 401 U.S. 948 (1970) (regulation against wearing of button announcing anti-war demonstration upheld in light of potential disruptive effect).

40. See, e.g., Baughman v. Freienmuth, 478 F.2d 1345 (4th Cir. 1973).

41. A few courts have held that school officials cannot require prior approval under any circumstances without violating the First Amendment's prohibition of censorship. See, e.g., Fujishima v. Board of Ed., 460 F.2d 1355 (7th Cir. 1972).

42. Papish v. Board of Curators of University of Missouri, 410 U.S. 667, 670 (1973) (per curiam).

43. 408 U.S. 169 (1972).

44. 408 U.S. at 190.

45. Id.

46. In Widmar v. Vincent, 454 U.S. 263 (1981), the Supreme Court held that once a university permits its facilities to be used by student groups, it may not exclude from the forum any speech activity -- including religious speech -- based on content absent a compelling state interest. Moreover, the Court interpreted Healy v. James as holding that a state university is an open forum per se for students, so that any

attempt to restrict students' access to buildings, facilities, and other forms of communication "must be subjected to the level of scrutiny appropriate to any form of prior restraint." 454 U.S. at 268, n. 5.

47. The Third Circuit, in ruling that the use of high school classrooms for religious student group meetings violates the Establishment Clause, Bender v. Williamsport Area School District, 741 F.2d 538 (3rd Cir. 1984), cert. granted, 105 S. Ct. 1167 (1985), also noted, contrary to Widmar, supra, note 46, that "[t]he [school district] would have been justified in refusing to reserve high school property for use as a public forum for expression, and would violate no constitutional constraints in doing so." 741 F.2d at 546.

48. Four circuits voted affirmatively on this issue. Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970); Massie v. Henry, 455 F.2d 779 (4th Cir. 1972); Holsapple v. Woods, 500 F.2d 49 (7th Cir.) (per curiam), cert. denied, 419 U.S. 901 (1974); Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971); cf. Dwen v. Barry, 483 F.2d 1126 (2d Cir. 1973), rev'd sub nom. Kelley v. Johnson, 425 U.S. 238 (1975). Five other circuits rejected these constitutional claims. Zeller v. Donegel School District, 517 F.2d 600 (3rd Cir. 1975); Karr v. Schmidt, 460 F.2d 609 (5th Cir.) (en banc), cert. denied, 409 U.S. 989 (1972); Gfell v. Rickelman, 441 F.2d 444 (6th Cir. 1971); Hatch v. Goerke, 502 F.2d 1189 (10th Cir. 1974); Olff v. East Side Union High School Dist., 445 F.2d 932 (9th Cir. 1971), cert. denied, 404 U.S. 1042 (1972).

The courts have also divided on the issue with regard to whether the plaintiff's rights were protected if he were a college student, even though not protected if a high school student. Although the Fifth Circuit had struck down a student's claim in Karr v. Schmidt, in Lansdale v. Tyler Junior College, 470 F.2d 659 (5th Cir. 1972) (en banc), cert. denied, 411 U.S. 986 (1973), the court held that because of a college student's maturity and thus the educational institution's diminished role, the balance is in favor of the individual. The adult's constitutional right to wear his hair as he chooses supersedes the state's right to intrude. By contrast the Ninth Circuit stood firm against both college and high school students, seeing no distinction. See King v. Saddleback Junior College Dist., 445 F.2d 932 (9th Cir.), cert. denied, 404 U.S. 979 (1971); Olff, supra.

49. The Supreme Court, however, decided a case concerning a policeman who claimed that a hair length regulation violated his First Amendment freedom of expression, as well as the Fourteenth Amendment's guarantee of due process and equal protection. Kelley v. Johnson, 425 U.S. 238 (1976). The majority held that the burden was on the plaintiff to show

that the regulation was irrational or arbitrary and this he could not do since either a "desire to make a police officer readily recognizable to the members of the public, or a desire for the esprit de corps which such similarity is felt to inculcate within the police force itself," was held to be a rational justification for the regulation. 425 U.S. at 248. Whether and to what extent the Kelley decision is applicable to teachers and students in schools remains a matter of speculation. Teachers are not employees in a state military organization, although they are supposed to be role models for students. Students, on the other hand, are neither analogous to policemen nor to teachers.

50. The majority in Epperson v. Arkansas cites Meyer v. Nebraska, 262 U.S. 390 (1923), as holding that the Due Process Clause prohibits arbitrary restrictions upon the freedom of teachers to teach. 393 U.S. 97, 105 (1968).

51. See Board of Education, Island Trees Union Free Sch. Dist. v. Pico, 457 U.S. 853 (1982).

52. Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

53. Id.

54. In Keyishian, faculty members of a state university had refused to sign a certificate that required them to declare that they were not Communists, or that if they had been Communists, that they had communicated that fact to the president of the state university in New York. Thus, the case involved the attempt of a state to exclude subversives from the teaching profession. However, Keyishian does not suggest that the holding might be limited to college professors. The Court declared the entire law unconsitutional and not merely the amendment covering higher education employees.

55. Epperson v. Arkansas, 393 U.S. 97, 107 (1968).

56. Id. at 113-14 (Black, J., concurring).

57. Id. at 115-16 (Stewart, J., concurring). In Minnesota State Board of Community Colleges v. Knight, ____ U.S. ____, 104 S.Ct. 1058 (1984), Justice Brennan, in a dissenting opinion, seems to suggest that Epperson was decided on grounds of academic freedom rather than the Establishment Clause, ____ U.S. at ____, 104 S. Ct. at 1072.

58. For contrasting views of the extent to which "academic freedom" is protected by the Constitution, see Van Alstyne, The Constitutional Rights of Teachers and Professors, 1970 DUKE L.J. 841, and Goldstein, The Asserted Constitutional

Right of Public School Teachers to Determine What They Teach, 124 U. PA. L. REV. 1293 (1976).

59. Compare Parducci v. Rutland, 316 F. Supp. 352 (M.D. Ala. 1970) (teacher has right to determine use of appropriate classroom materials which are not obscene or disruptive) with Cary v. Board of Education, 598 F.2d 535 (10th Cir. 1979) (teachers have no right to choose books which school board bans).

60. 457 U.S. at 869.

61. Pickering v. Board of Education, 391 U.S. 563, 573 (1968).

62. Mt. Healthy City School District v. Doyle, 429 U.S. 274, 286-88 (1977).

63. See, e.g., Givhan v. Western Line Consolidated School District, 439 U.S. 410, 415 n. 4 (1979).

64. See, e.g., Nigorian v. Weiss, 343 F. Supp. 757 (E.D. Mich. 1971); Clark v. Holmes, 474 F.2d 928 (7th Cir. 1972), cert. denied, 411 U.S. 972 (1973).

65. 406 U.S. 205 (1972).

66. Compare Ohio v. Whisner, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976) with State ex rel. Douglas v. Faith Baptist Church, 207 Neb. 802, 301 N.W.2d 371, app. dismissed, 454 U.S. 803 (1981).

67. See, Brown v. Dade Christian Schools, 356 F.2d 310 (5th Cir. 1977) (en banc), cert. denied, 434 U.S. 1063 (1978). The plurality opinion declined to reach the question of the constitutionality of §1981 as applied to a religious school, holding that there was substantial evidence to support the findings of the trial judge that "defendants' policy of segregation was not the exercise of religion." 556 F.2d at 312.

68. Lower courts have considered a variety of free exercise problems. See, e.g., Menora v. Illinois High School Association, 683 F.2d 1030 (7th Cir. 1982), cert. denied, 459 U.S. 1156 (1983) (prohibition against headgear in basketball games not unconstitutional in excluding yarmulkes), Walsh v. Louisiana High School Athletic Association, 616 F.2d 152, rehearing denied, 621 F.2d 440 (5th Cir. 1980), cert. denied, 449 U.S. 1124 (1980) (transfer rule not unconstitutional as applied to prevent student from playing for religious high school), Moody v. Cronin, 484 F. Supp. 270 (C.D. Ill. 1979) (requirement of "immodest" clothing in physical education classes violated free exercise rights of some students),

Roman v. Appleby, 558 F. Supp. 449 (E.D. Pa. 1983) (counseling sessions with student on matters of religion, sex, family relationships, etc. violated neither parents' nor students' free exercise rights).

69. 374 U.S. 203 (1963).

70. Id. at 309, 312. (Stewart, J., dissenting).

71. Arons, The Separation of School and State: Pierce Reconsidered, 46 HARV. EDUC. REV. 76 (1976).

72. See, e.g., Brusca v. State of Missouri, 332 F.Supp. 275 (E.D. Mo. 1971), aff'd mem. 405 U.S. 1050 (1972). The plaintiffs in the Brusca case argued that the failure of the state to subsidize religious schools violated the neutrality that the state must follow in the Establishment Clause.

73. Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 764-65 (1973).

74. Id. at 788.

75. New Jersey v. T.L.O., ____ U.S. ____, 105 S. Ct. 733 (1985).

76. Camara v. Municipal Court, 387 U.S. 523, 528-29 (1967).

77. Chimel v. California, 395 U.S. 752 (1969).

78. Almeida-Sanchez v. United States, 413 U.S. 266, 270 (1973).

79 ____ U.S. at ____. 105 S. Ct. at 742.

80. Id. at 744.

81. Id.

82. Id. at 743. In the course of its opinion, the Court identified -- but did not rule on -- a variety of related questions. While the petition for certiorari only questioned the applicability of the exclusionary rule to evidence in criminal juvenile delinquency proceedings obtained illegally by school authorities, the Court's finding that the search was legal obviated the need to address the exclusionary rule. Consequently, the Court expressly reserved judgment on that issue after noting a split in lower court authority, 105 S. Ct. at 738-9 and n. 2, 3. Since there was no ruling on this matter, the Court also did not address whether, even if it should find that the exclusionary rule applied to illegally obtained evidence used in criminal proceedings, the same evidence could be used by school officials in a disciplinary proceeding.

Several more unanswered questions concern police involvement in school searches. The Court limited its holding to searches made by school authorities acting on their own and, while raising the issue, did not intimate its opinion about searches in which the police and school authorities act together or where one acts on the request of the other. 105 S. Ct. at 741, n. 5 and at 744, n. 7. Furthermore, the standard articulated in T.L.O. turned on the Court's acknowledgment of the student's legitimate expectation of privacy in her personal property. The Court noted that it is an open question whether or not the same expectation of privacy in school storage space (lockers, desks, etc.) is in fact legitimate and thus entitled to Fourth Amendment protection. While the Court did not answer the question, it noted that lower courts are divided on the issue. 105 S. Ct. 741, n. 5.

83. 419 U.S. 565 (1975).

84. Id. at 574-75. The Court found that the students had a liberty interest in their "good name, reputation, honor, or integrity" and noted that the charges -- if sustained -- could damage the students' standing among classmates and teachers as well as "interfere with later opportunities for higher education and employment." Id. at 575.

85. Cf. Goldberg v. Kelly, 397 U.S. 254 (1970); Bell v. Burson, 402 U.S. 535 (1971).

86. For example, more formal hearings could be required at which the student may be represented by counsel, confront witnesses against him and cross-examine them, and call his own witnesses. Goss, 419 U.S. at 583-84.

87. Ingraham v. Wright, 430 U.S. 651, 672 (1977).

88. Id. at 676-80. Ingraham also held that Eighth Amendment protection is inappropriate and thus inapplicable in corporal punishment cases. "The openness of the public school and its supervision by the community," state laws prohibiting excessive punishment, and recourse against school officials in civil or criminal actions provide adequate protection for the student. 430 U.S. at 671. Thus, in the Court's view, the child is quite unlike a sequestered criminal who may need constitutional redress for beatings at the hand of a jailer. The Court concluded that there was neither justification in case law nor in the history of the Eighth Amendment to extend its protection beyond criminals. Justice White argued in a strong dissent that the existence of various safeguards or state authorized redress is irrelevant to the Constitution's prohibition against excessive punishment. 430 U.S. at 683

(White, J., dissenting). So long as there are any excessive beatings in schools, those beatings are "punishments" within the meaning of the Eighth Amendment and subject to judicial scrutiny. It is absurd, he argued, to hold that "corporal punishment in public schools, no matter how barbaric, inhumane, or severe is never limited by the Eighth Amendment." Id. at 692.

89. Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78 (1978).

90. Id. at 85-86. The Court referred to the requirements of Goss v. Lopez, supra, for school conduct rule violations and held that for a failure to meet academic standards "far less stringent procedural requirements" are necessary. Since Horowitz -- a medical student -- had been warned several times that her progress was not satisfactory and was even examined by seven independent physicians prior to her dismissal, those minimal requirements were met in her case.

91. 408 U.S. 564 (1972). Roth found that a property interest in the professor's continued employment must be based on "a legitimate claim of entitlement" to the position. Since Roth was merely serving a one year, non tenure-track appointment, he had no legitimate claim of entitlement and the Board was not constitutionally required to inform him of the reasons for their decision not to rehire him. Moreover, because the decision was not accompanied by any "charge against him that might seriously damage his standing and associations" in the professional community, Roth could not claim injury to any liberty interest he might have had in his reputation. Id. at 574.

92. 408 U.S. 593 (1972). Perry emphasized that a teacher need not have tenure to have a property interest in his position. Instead, the Court held the requisite "legitimate claim of entitlement" could be based on an "understanding fostered by the college administration" amounting to a "de facto tenure program" Id. at 600-01. Thus Sinderman -- a veteran of ten one-year appointments with the Texas college system including four in his last position -- was entitled to show at trial "such rules (of the Texas college system) or mutually explicit understandings" which supported his claim to a property interest. Id. at 601. If Sinderman could establish that interest at trial, then he would be entitled to a hearing at which the Board would have to inform him of the grounds for its decision and allow him to challenge the sufficiency of those grounds. Id. at 605.

93. Keyes v. School Dist. No. 1, 413 U.S. 189 (1973).

94. Compare Johnson v. San Francisco Unified Sch. Dist., 500 F.2d 349 (9th Cir. 1974) with Oliver v. Kalamazoo Bd. of Educ., 368 F. Supp. 143, 161 (W.D. Mich. 1973), aff'd, 508 F.2d 178, 181-82 (6th Cir. 1974), cert. denied, 421 U.S. 963 (1975). See also Arthur v. Nyquist, 573 F.2d 134 (2d Cir. 1978), cert. denied, 439 U.S. 860 (1978).

95. Columbus Board of Educ. v. Penick, 443 U.S. 449 (1979).

96. See, e.g., Keyes, supra at note 93; Columbus II, supra, at note 95; Swann v. Charlotte-Mecklenberg Board of Education, 402 U.S. 1 (1971); Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976).

97. Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

98. Swann v. Charlotte-Mecklenburg Board of Educ., 402 U.S. 1 (1971).

99. Keyes, supra, at note 93; Columbus II , supra, at note 95.

100. Milliken v. Bradley, 418 U.S. 717 (1974).

101. 20 U.S.C. §§1681-1682; 34 C.F.R. pt. 86.

102. The case of Vorchheimer v. School District of Philadelphia, 532 F.2d 880 (3d Cir. 1976), reached the Supreme Court, but the Third Circuit decision denying a woman student access to an all male academically elite public high school because there was a similar academically elite high school for women was affirmed by an equally divided Court. 430 U.S. 703 (1977).

103. Lower courts have held that schools must provide equal opportunities to males and females for the chance to participate in athletic competition. For example, if the school does not offer a particular women's team sport offered to men, then it must allow women the chance to compete on the men's team. See Brenden v. Independent School District No. 742, 477 F.2d 1292 (8th Cir. 1973) (tennis and skiing), Hoover v. Meiklejohn, 430 F. Supp. 164 (D. Colo. 1977) (basketball). Hoover noted that separate, but comparable, teams for men and women would provide the constitutionally required equality of opportunity since the mere separation of teams by gender would not involve the "stigmatizing inferiority" for one group which race divisions involve. 430 F. Supp. at 170. However true that may be, there is still a problem in assessing which "separate" sports programs are in fact, "equal". Compare Dodson v. Arkansas Activities Association, 468 F. Supp. 394 (D. Ark. 1979) (difference in boys' and girls' basketball rules had

no rational basis since founded merely on tradition) with Cape v. Tennessee Secondary School Athletic Association, 563 F.2d 793 (6th Cir. 1977) (state had rational basis for providing different rules for boys' and girls' basketball).

104. Brown v. Board of Education, 347 U.S. 483, 495 (1954).

105. See generally Levin, Current Trends in School Finance Reform Litigation: A Commentary, 1977 DUKE L.J. 1099

106. After Rodriguez, most standards were developed under state constitutional provisions rather than under the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. See, e.g., Serrano v. Priest, 5 Cal.3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971) (Serrano I) (fiscal neutrality standard under Fourteenth Amendment's equal protection clause); Serrano v. Priest, 18 Cal.3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1977) (Serrano II) (fiscal neutrality standard under state constitution's equivalent of equal protection clause); Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273, reargument, 63 N.J. 196, 306 A.2d 65, cert. denied sub nom. Dickey v. Robinson, 414 U.S. 976 (1973); Seattle School District No. 1 of King County v. State, 90 Wash.2d 476, 585 P.2d 71 (1978); Board of Education v. Nyquist, 94 Misc.2d 466, 408 N.Y.S.2d 606 (1978), modified, 83 A.D.2d 217, 443. N.Y.S.2d 843 (1981), modified, 453 N.Y.2d 27, 453 N.Y.S.2d 843, 439 N.E.2d 359 (1982).

107. Fialkowski v. Shapp, 405 F. Supp. 946 (E.D. Pa. 1975); cf., Lau v. Nichols, 414 U.S. 563 (1974).

108. Cf. Board of Education v. Rowley, 458 U.S. 176 (1982); Equal Educational Opportunity Act of 1974, 20 U.S.C. §1703(f).

109. See, e.g., Lau v. Nichols, 414 U.S. 563 (1974) (failure to provide special instruction to non-English speaking Chinese students violates §601 of the Civil Rights Act of 1964 which prohibits discrimination in any program receiving federal funding.); Board of Education v. Rowley, 458 U.S. 176 (1982) (school does not have to provide sign language interpreter for deaf student under the Education of the Handicapped Act's requirement that schools funded under EHA provided "free appropriate" education to handicapped students).

110. 411 U.S. 1 (1973).

111. In the Rodriguez Court's view, the subject of the classification was property-poor districts, not poor persons. The injured class was said to be comprised of all students who lived in low-property wealth school districts, rather than indigent students who might live in either low- or high-

property wealth districts or indigent students who lived in property-poor school districts. Justice Powell, who wrote the majority opinion, noted that the precedents involving wealth discrimination had been confined to discrimination on the basis of personal wealth. 411 U.S. at 20.

112. 411 U.S. at 28.

113. Id. at 33-34. The Court also noted that the cases in which it had held the strict scrutiny standard applicable involved legislation that infringed or interfered with the free exercise of a fundamental right. In Rodriquez, by contrast, the state of Texas was not interfering with or restricting the ability of school districts to provide education. Instead, by allocating some state funds to school districts, rather than relying solely on local revenues to finance education, the state was attempting to expand, not restrict, the available educational offerings. Id. at 37-39.

114. 411 U.S. at 56.

115. 411 U.S. at 38.

116. Id. at 25, n. 60.

117. Craig v. Boren, 429 U.S. 190, 197 (1976).

118. Vorchheimer v. School Dist. of Philadelphia, 430 U.S. 703 (1977), aff'd by an equally divided Court, 532 F.2d 880 (3d. Cir. 1976).

119. 458 U.S. 718 (1982)

120. Id. at 730.

121. 457 U.S. 202 (1982).

122. Board of Education v. Rowley, 458 U.S. 176 (1982); Irving Indep. Sch. Dist. v. Tatro, ____ U.S. ____, 104 S. Ct. 3371 (1984).

123. City of Cleburne v. Cleburne Living Center, Inc., ____U.S. ____, 105 S. Ct. 3249 (1985).

124. 105 S. Ct. at 3254.

125. Lau v. Nichols, 414 U.S. 563 (1974)

126. Cf., Washington v. Davis, 426 U.S. 229 (1976).

127. See, e.g., Establishment Clause cases which emphasize college students' maturity and scepticism, versus high

school students' impressionability in assessing the "primary effect" of state aid programs. Compare Widmar v. Vincent, 454 U.S. 263 (1981) (religious student groups may use university facilities for meetings) with Bender v. Williamsport Area School Dist., 741 F.2d 538 (3rd Cir. 1984), cert. granted, ____ U.S. ____, 105 S. Ct. 1167 (1985) (religious student groups may not use high school facilities for meetings); and compare Tilton v. Richardson, 403 U.S. 672 (1971) and Roemer v. Board of Public Works, 426 U.S. 736 (1976) (permitting public aid to sectarian colleges) with Lemon v. Kurtzman, 403 U.S. 602 (1971) and Grand Rapids School Dist. v. Ball, ____ U.S. ____, 105 S. Ct. 3216 (1985) (prohibiting public aid to sectarian elementary and secondary schools). See also treatment of other First Amendment interests. Compare Karr v. Schmidt, 460 F.2d 609 (5th Cir.) (en banc), cert. denied, 409 U.S. 989 (1972) (high school hair regulations are appropriate given the schools' mission and relative immaturity of high school students) with Lansdale v. Tyler Junior College, 470 F.2d 659 (5th Cir. 1972) (en banc), cert. denied, 411 U.S. 986 (1973) (college student's right to wear hair any length he wishes is protected).

128. The question of liability of school officials for damages under §1983 if they should go too far in circumscribing the constitutional rights of students and teachers is dealt with in Wood v. Strickland, 420 U.S. 308 (1975). Wood v. Strickland granted school officials qualified immunity from liability for violating the constitutional or federal statutory civil rights of students when they act sincerely and with a good faith belief that what they are doing is right. Such immunity does not attach if the official's action which constituted the violation was taken with malicious intent to cause a deprivation of the student's rights or other harm, nor if the official knew or reasonably should have known that his action would violate the civil rights of the student. Further, compensatory damages can be allowed only on proof that the official's action "could not reasonably be characterized as acting in good faith." 420 U.S. at 323. Only violations of "clearly established constitutional rights" or of "settled indisputable law" are grounds for damage actions. Id. at 321-22.

Carey v. Piphus, 435 U.S. 247 (1978), further limited damage awards by requiring that they be based on proven, actual damages. If no such actual injury can be proven, the award is limited to one dollar in punitive damages, if the school can show that the suspension was justified.

A recent circuit court construed the damage limitations in Carey as applying only to violations of procedural due process. Bell v. Little Axe Independent School District,

No. 83-1458, _____ F.2d _____, (10th Cir. June 26, 1985). The court noted the unusually technical nature of procedural due process violations and distinguished them on that basis in holding that presumed damages are available for substantive due process violations. In this case, a school board permitted religious meetings in the school and a group of parents sued on the ground that the Establishment Clause had been violated, after they and their children were harrassed for not participating in the meetings.